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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 146

NICHOLAS GALLICCHIO,
Petitioner,

v.

STATE OF NEW JERSEY,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of New Jersey

BRIEF IN OPPOSITION

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Adams Press Corp., 11 Commerce Street, Newark, N. J.—Market 3-8611-12

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ON PETITION FOR WRIT OF CERTIORI TO THE SUPREME COURT OF NEW JERSEY

BRIEF IN OPPOSITION

Statement of Questions Involved

1. Is the issue of when the trial started of sufficient importance to the public and substantial enough issue to warrant the grant of *certiorari*?

2. Assuming *arguendo* that *Miranda* does apply, is petitioner's statement in the line-up admissible when it was voluntarily given and was not elicited from him during custodial interrogation?

3. Did the trial judge's decision invoking Rule 4 of New Jersey Rules of Evidence in order to avoid a side issue that would be unduly time consuming violate due process?

REASONS WRIT SHOULD BE DENIED

1. *Certiorari* is granted only in cases involving principles, the settlement of which is of importance to the public as distinguished from the parties themselves. *N.L.R.B.* v. *Pittsburgh S.S. Co.*, 340 U. S. 498 (1951). *Certiorari* is not granted for the benefit of the particular litigants. *Rice* v. *Sioux City Memorial Park Cemetery*, 349 U. S. 70 (1955). The problem here is one of definition *i.e.*, when does a trial begin. If it begins with the *voir dire* then the petitioner's claim would be denied because the *voir dire* was begun on June 6, 1966, which was seven days before the decision of *Miranda* v. *Arizona*, 384 U. S. 436 (1966). The warnings in *Miranda* will be applied prospectively and not retroactively. *Davis* v. *State of North Carolina*, 384 U. S. 737 (1966); *Johnson* v. *State of New Jersey*, 384 U. S. 755 (1966). This issue of when a trial commences is not such an issue which would meet the standard in *N.L.R.B.* v. *Pittsburgh, supra.* There is no great public need which would be served in applying a fixed rule to the case at bar. Furthermore the issue, in relation to *Miranda* is episodic and it is very unlikely that this same narrow point will continue to reappear in future cases. Therefore the case *sub judice* would not be of any beneficial importance to the public and would only benefit the petitioner, the particular litigant in the case. Also to grant the petition would

stray from the rule the Federal Courts now seem to follow. See Rule 43, Fed. R. Crim. procedure *infra*.

The time as of which a trial is regarded as having commenced may vary according to the statute being construed. In general, it has been held that a trial begins when the jury are called into the box for examinations as to their qualifications and that the calling of the jury is a part of the trial. *Jordon* v. *Savage*, 88 Ill. App. 2d 251, 232 N. E. 2d 580 (1967); *Wilhite* v. *Agbayani*, 2 Ill. App. 2d 291, 118 N. E. 2d 440 (1954); *State* v. *Canipe*, 240 N. C. 60, 81 S. E. 2d 173 (1954). Although jeopardy does not begin in a criminal case until after the jury have been selected and sworn, for all other purposes the trial begins when the jury are called into the box for their examinations as to their qualifications. *Caples* v. *State*, 3 Okl. Cr. 72, 104 P. 493 (1909). New Jersey, in the case *sub judice* has chosen to treat the *voir dire* as part of the trial. In *State* v. *Vigliano*, 50 N. J. 51, 232 A. 2d 129 (1966), the court said:

> "... [T]he *Miranda* rule should apply only to cases tried for the first time after June 13, 1966. In context we take commenced and begun to have the same significance, i.e., to refer to those cases or trials which *initiated* or in which the first *step* was taken after the started date" (emphasis added).

By "first step" we interpret to mean *voir dire*.

In choosing the *voir dire* as the commencement of a trial or part of the trial New Jersey does not stray from the Federal Court decisions Rule 43, Fed. R. Crim. procedure indicates that the *voir dire* is part of the trial. See 18 U.S.C.A. 308.

> "The dependent shall be present at the arraignment, *at every stage of the trial including the impanelling*

> *of the jury,* and the return of the sentence except as otherwise provided by these rules" (emphasis added).

See also *United States* v. *White,* 237 F. Supp. 644 (D. C. Va. 1964). Since rule 43 indicates the impaneling is part of the trial, it follows that the subsequent *voir dire* is part of the trial. *Contra,* see *Hay* v. *Reed,* 93 Ind. App. 592, 178 N. E. 873 (1931); *Nix* v. *State,* 240 Ind. 392, 166 N. E. 2d 326 (1960), holding that the *voir dire* examination is not part of the trial.

Thus, the State of New Jersey has chosen the rule that the *voir dire* commences the trial. This does not affect the constitutional safeguards of *Miranda.* It is just the rule chosen by the state to carry out the demands of justice. In discussing the procedural rules which developed from the landmark case of *Mapp* v. *Ohio,* 367 U. S. 643 (1961), the court said in *Kerr* v. *State of California,* 374 U. S. 23 at 34 (1963).

> "... the states are not thereby precluded from developing workable rules governing arrests and search and seizure to meet the practical demands of effective criminal investigation and law enforcement in the states, provided that those rules do not violate the constitutional prescription of unreasonable searches and seizures ..."

Applying the same rationale of *Kerr* v. *State of California, supra,* the State of New Jersey contends that it has merely provided for the workable ends of justice in the case at bar. Different States have developed different methods in meeting the new standards which have come down in *Escobedo, Mapp* and *Miranda.* As *Kerr* v. *State of California, supra* points, as long as the workable rules

do not violate the constitutional safeguards they will be acceptable. The choice of rules, when proper, cannot be said to raise a constitutional issue when a particular litigant disagrees with the specific rule chosen. That is what happened here. The petitioner, in order to meet his own need, would say that New Jersey erred in considering the *voir dire* as the beginning or part of the actual trial. The petitioner's argument is entirely without weight. New Jersey has formed a rule within the constitutional limits, and though regretfully excluding the petitioner, the rule is still a valid constitutional decision. There is no principle which is of importance to the public and since the question will not continue to plague the courts, there is no necessity for granting the writ of *certiorari*. Therefore, petitioner's request should be denied.

2. The prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. *Miranda* v. *State of Arizona*, 384 U. S. 436 at 444. Custodial Interrogation means questioning initiated by law enforcement officers after a person is taken into custody or otherwise deprived of his freedom by action in any significant way. *Miranda, supra* at 444. Here the defendant had been in custody for an hour, but he was not being questioned when he made the statement:

> "You might as well go pick me out because everyone else will."

Defendant volunteered this statement. He was not being questioned and it cannot be said that the statement was the product of in-custody or custodial interrogation. The *Miranda* decision recognizes at least two exceptions to its

exclusionary rule; general on the scene questioning as to facts surrounding a crime and statements freely volunteered without compelling influence. *State* v. *Gosser,* 50 N. J. 438, 236 A. 2d 874.

> "In dealing with statements we do not purport to find all confessions inadmissible . . . [A]ny statement given freely and voluntarily without any compelling influence is of course admissible in evidence . . . [V]olunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today."

Cf. United States v. *Repetti,* 364 F. 2d 54 (2nd Cir. 1966) holding:

> "Statement by the defendant in a narcotics prosecution, made immediately after he was arrested was not erroneously admitted where it was volunteered and not elicited by interrogation and was finally stricken as irrelevant."

Cf. also *Diaz* v. *United States,* 264 F. Supp. 937 (D. C. La. 1967).

Thus, it is apparent that petitioner's statement is clearly admissible. He was not being questioned by the police. He was being subjected to a regular police procedure. The lineup is regularly used for the detection of crime as are other police devices such as fingerprinting.* There was

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* Although it is recognized that a defendant is now entitled to counsel at a line-up. *Gilbert* v. *State of California,* 388 U. S. 263; *United States* v. *Wade,* 388 U. S. 218 (1967), the rule of those cases is not applicable to the case at bar. *Stovall* v. *Denno,* 388 U. S. 293 (1967).

no undue influence or coercion upon the defendant when he blurted out the incriminating statement. Therefore, even applying the rule of *Miranda* to the case at bar, the statement by the petitioner is still admissible because it was voluntarily given without the use of interrogation or coercion.

The petitioner would have the court rely on *State* v. *La Fernier,* 37 Wis. 2d 365, 155 N. W. 2d 93 (1967). However, that case is easily distinguished from the case *sub judice.* In *La Fernier,* the defendant had been arrested on June 30, 1966, at 3:30 P.M. and was incarcerated continuously until 9:30 A.M. the following day. He was taken into a room where he agreed to take a polygraph examination. Upon entering the room the defendant made a voluntary statement. The court ruled the statement inadmissible as the defendant had not been apprised of his rights under *Miranda* until after he made the statement Certainly petitioner cannot contend that the circumtsances were the same in the case before the court now and that of *State* v. *La Fernier.* A line-up contains no coercion or fear, and is an ordinary procedure. But a lie detector test is far from ordinary and could easily insert fear or coercion into the mind of a person who had been in jail for 18 hours.

Therefore, *State* v. *La Fernier, supra* can add no support to petitioner's position. For the reasons stated even if *Miranda* were to apply to this case, the petitioner's statement would still be admissible. Therefore *certiorari* should be denied petitioner.

3. It appears that a good portion of the last five days of the trial of the within matter was devoted to a collateral issue which arose concerning the testimony of two defense witnesses, Nicholas Salardino and John Lardieri. Salardino will be hereafter referred to as "Demas" and Lardieri as "Baer."

Detective John Biancone testified on behalf of the State to the effect that, on that date of the killing he observed the defendant fleeing the area of the crime in the car which was otherwise identified as the vehicle used by the defendant. The Detective testified that he made this observation while standing on a street corner with two men known to him only as Demas and Baer. This was brought out on cross-examination.

Subsequently, both Demas and Baer testified as defense witnesses and both indicated in substance that they had not seen the Detective nor had they been standing with him at the time Biancone's observation was made. The essence of the testimony of Biancone, Demas and Baer as told here by the jury was as just stated herein. What follows is a discussion of subsequent developments, none of which were communicated to the jury.

Following the testimony of Demas and Baer, and on the same evening that they finished testifying, Biancone attempted to contact both men. He succeeded in contacting Salardino and apparently took him for a ride during the course of which he struck Salardino. When the Court was apprised of this, and of the request of both counsel an *in camera* hearing was held, at which time both Baer and Biancone testified. Baer testified in substance that Biancone had tried to reach him and failed. He further testified that Demas called him and told him that Biancone had threatened him and had beat him up.

Biancone testified in substance that he realized the impropriety of his having gone to speak to Demas but that he did so to find out why Demas had lied. He stated that Demas had gone to him during the previous week at police headquarters after he, Biancone, had testified and mentioned the names of Demas and Baer. Demas had told Bi-

ancone that he had been approached by the defendant's father and was under some pressure to testify contrary to the truth. Biancone consulted Demas to tell only the truth when he was called at the trial. Biancone had thus gone to see Demas after the latter testified to determine why Demas and Baer had not told the truth.

The attorney for the defendant requested the opportunity to recall Biancone and examine him only as to his having attempted to contact the two men and his having used threats, abuse and violence on Demas. The State took the position that if this was done, it would have the right to bring out the motive for Biancone's behavior as he did, including the statement of Demas that the defendant's father had become involved in attempting to influence testimony. When the trial court indicated that it felt the whole story should be brought out, if any of it was to be brought out, the defense indicated some doubt as to whether to recall Biancone. Finally, apparently treating the matter as an application for the re-opening of cross-examination of Biancone, the trial court ruled that the exploration of all of these matters would open up collateral issues not relevant to the main issues before the jury. The trial court's ruling, to the extent it was a ruling, was based upon the possible prejudice, which would inure to the defendant if it was brought out that his father attempted to influence a witness.

It is submitted that the trial court correctly ruled. While the attempt by one witness to influence the testimony of another is indeed reprehensible, it is submitted that the attempt which took place here was not one which, by its very nature, should have been made known to the jury. Demas and Baer had already testified at the time Biancone reached out for them. Their testimony, which clearly contradicted that of Biancone, was before the jury and

thus not subject to tampering by anyone. The conflict in the testimony of Biancone and the two defense witnesses was properly left for the jury to resolve.

Moreover, the trial court's indication that, if the matter was re-opened, the full story should be told to he jury was, it is submitted, a proper ruling. If there, in fact, was a motive for Biancone's behavior, that motive should have been presented to the jury. However, the trial court saw the revealing of the full story as being the opening of collateral issues unrelated to the guilt or innocence of the defendant. While the issue of credibility should not unduly be restricted at trial, there does exist discretion in the trial court to limit examination thereon, when to allow it to continue would mean the creation of another trial within a trial. A judge may in his discretion exclude evidence if he finds that its probative value is substantially outweighed by the risk that its admission will create substantial danger of confusing the issues or misleading the jury. *Rule of Evidence* No. 4, N.J.S. 2A:84A-16. Furthermore, the order of receiving evidence, recalling of witnesses for further cross-examination, and acceptance or rejection of rebuttal testimony are matters within the trial court's broad discretion, exercise of which will not be disturbed on appeal, in the absence of a clear showing of abuse. *Johnson* v. *United States*, 207 F. 2d 314 (5th Cir. 1953), *cert.* denied 347 U. S. 938; *Delanger* v. *Alton Box Bd. Co.*, 180 F. 2d 87 (7th Cir. 1950). The trial court saw the recalling of the witness as being the opening of collateral issues unrelated to the guilt or innocence of the defendant. There was no error on the trial court's decision. Therefore, defendant's petition should be denied.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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